No. 93-521

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURIAE WILTEL, INC., ET AL. IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Statutes

Miscellaneous

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici WilTel, Inc., LDDS Communications, Inc. d/b/a LDDS Metromedia Communications, Cable & Wireless Communications, Inc., Chadwick Telecommunications Corp., American Network Exchange, Inc., KLP, Inc. d/b/a Call-America, U.S. Long Distance, Inc., Consolidated Network, Inc., Capital Network System, Inc., Impact Telecommunications Corp., LCI International, Inc., One-2-One Communications, Inc., and Telephone Electronics Corp. are long distance telephone companies of varying size. All of these companies are considered nondominant interexchange carriers by the Federal Communications Commission, and accordingly were not re-

quired to file and maintain tariffs with the Commission prior to the decision below. America's Carriers Telecommunications Association is a trade association representing nondominant long distance carriers. MFS Communications Company is a competitive local exchange carrier in the emerging market for alternatives to the local telephone company monopolies, and also was not required to file tariffs prior to the decision below.

Under the court of appeals' decision, *amici* will be required to file tariffs with the Federal Communications Commission. This requirement will not only result in added financial burdens on *amici* but will also be detrimental to the viability and further development of telecommunications competition. *Amici* therefore have a direct stake in the outcome of this case, and submit this brief to explain that the issue presented here is not simply an isolated dispute between AT&T and MCI, but rather is of far-reaching significance to the entire telecommunications industry. This brief is filed with the consent of the parties. Copies of the consent letters have been filed with the Clerk.

STATEMENT OF THE CASE

This case arises from a decision of the Court of Appeals for the District of Columbia Circuit invalidating the long-standing permissive detariffing policy of the Federal Communications Commission ("FCC" or "Commission"). The court of appeals found that this policy, which the FCC has characterized as "one of the cornerstones" of its regulation of developing telecommunications competition,[1] vio-

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[1] 93-356 Pet. App. 65a. Appendix references are to the appendix to the petition for writ of certiorari filed by MCI Telecommunications Corp., which seeks review of the same decision at issue in this case. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.* (No. 93-356). Unless otherwise indicated, citations to FCC orders and notices are citations to such items in the *Competitive Carrier Rulemaking* docket.

lated Section 203 of the Communications Act of 1934, as amended ("the Communications Act" or "the Act"), 47 U.S.C. § 203.

The facts and procedural history of the case are fully set forth in the Petition and will not be repeated.

SUMMARY OF ARGUMENT

The *amici* here fully endorse the legal analysis set forth in the Petition. We agree that the court of appeals read the plain meaning of Section 203 too narrowly when it found that this provision did not give the FCC the flexibility to adopt permissive detariffing. We agree that the court failed to consider and give deference to the FCC's reasonable interpretation of its governing statute as required by *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). And we agree that Congress has clearly ratified this interpretation in legislation that the court below ignored, the Telephone Operator Consumer Services Improvement Act of 1990, 47 U.S.C. § 226.

We are writing here not to repeat those legal arguments, but rather to emphasize the overwhelming importance of this matter to the Nation's ongoing transition from monopoly to competitive telecommunications markets.[2] This transition is at a relatively advanced (but incomplete) stage in the long distance market. Competition with local telephone companies, however, is only beginning. The FCC had just taken its first major steps to encourage such competition when the D.C. Circuit invalidated the

[2] Review of the decision below has been supported not only by the government, but also by virtually all major competitors to AT&T and the local telephone companies, and the respective trade associations of those competitors. In addition to this brief of *amici*, MCI Telecommunications Corp. has filed a separate petition for certiorari (No. 93-356) and respondents Sprint Communications Company, the Competitive Telecommunications Association, and the Association for Local Telecommunications Services have supported the petition filed by the government in this case.

permissive detariffing policy. The court's decision is a major step backward toward a regulatory regime that stifles competition and innovation by granting substantial power to dominant carriers to control the telecommunications market.

The court of appeals struck down one of the most important tools used by the FCC to manage competitive market development. The FCC has used the flexibility provided by Section 203 of the Act to avoid harmful and unnecessary tariff regulation of developing competitors—regulation that the Commission has found could prevent competition from taking root in the face of the market power of preexisting monopolies. As market competition grows, the Commission then uses this flexibility gradually to reduce regulation of the dominant monopoly. Review by this Court is necessary to restore this tool to the FCC, remove the confusion created by the court below, and clarify the rules governing the competitive telecommunications market at both the long distance and local levels.

Failure to restore permissive detariffing will have a significant adverse impact on the FCC's ability to complete the development of a fully competitive long distance market—a market in which AT&T still holds over a 60 percent market share, three times greater than its nearest rival. Equally important, without permissive detariffing the Commission will be severely hampered in its ability to foster nascent competition with the local telephone companies. Thus, this matter has broad importance to all sectors of the telecommunications industry—as well as to users of telecommunications service, who strongly supported permissive detariffing below.

At a minimum, the Court should accept this case to clarify the central question of the meaning of Section 203. The FCC's tariff policies go to the heart of the relationship between telecommunications carriers and their customers. Therefore, uncertainty as to the lawfulness of these policies casts a chilling cloud over the entire indus-

try. AT&T and certain telephone companies already have challenged the FCC's related action to adopt new tariff policies in compliance with the decision below. These challenges rest on the same interpretation of Section 203 that is under dispute here. Even worse, AT&T and other dominant carriers are relying on the court of appeals' interpretation of Section 203 in seeking money damages from their smaller competitive rivals. Although such claims are meritless, they further chill market competition. A definitive ruling on Section 203 thus is necessary to restore order to the telecommunications market and flexibility to the FCC's pro-competitive policies.

ARGUMENT

If permitted to stand, the decision of the court of appeals will have profound effects on both past actions and future development of the domestic telecommunications industry. The decision has thrown the further development of competitive telecommunications into doubt, as it removed from the FCC a primary means by which it has encouraged that development in the past. The decision is also being aggressively used by dominant carriers to attack nondominant carriers' past actions undertaken in reliance on the Commission's permissive detariffing rules through the pursuit of damage claims against their smaller rivals. This Court's consideration of the decision below, therefore, is of vital importance to the continued growth and maturation of the Nation's telecommunications industry.

I. THE FCC'S PERMISSIVE DETARIFFING POLICY HAS BEEN A PRIMARY FACTOR IN THE DEVELOPMENT OF COMPETITION IN THE MARKET FOR LONG DISTANCE SERVICES

In announcing the results of the rulemaking at issue here, the FCC determined that "permissive detariffing has proven to be a success over the years, as evidenced by

the robust competition in the interexchange [long distance] market and the increased choices for customers with respect to carriers and prices." 93-356 Pet. App. 29a. Consumer choice increased dramatically under the policy: "In 1982, approximately a dozen long distance carriers operated within the United States. By March 1992, there were an estimated 482 such carriers purchasing switched access from local exchange carriers." *Id.* at 30a (footnote omitted). From 1984 until the end of 1992, "overall interstate calling has grown at an annual rate of about 12%, with carriers other than AT&T posting an average annual growth rate in excess of 25%." *Id.* at 31a. AT&T's share of the market, while still large enough to secure its place as the dominant carrier, "declined from over 80% to just more than 60%, while its rates for directly dialed interstate have also fallen substantially." *Id.* (footnote omitted).[3]

Although several factors undoubtedly contributed to the dynamic rate of change in the telecommunications market, the role of the permissive detariffing policy has been particularly significant. The FCC recognized at an early stage that conventional tariff regulation would be counterproductive to its goal of encouraging new competition to AT&T. Consequently, in 1979 the Commission began its *Competitive Carrier Rulemaking*, which ultimately led to adoption in 1982[4] of the permissive detariffing rules found unlawful nearly a decade later by the D.C. Circuit.

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[3] The FCC has reported that "at the end of 1992, about 73% of the nation's [telephone] lines were presubscribed to AT&T, 15% to MCI and 6% to US Sprint," with "[o]ver four hundred smaller carriers" accounting for the remainder of the interstate long distance industry. FCC Industry Analysis Division, *Long Distance Market Share, Second Quarter 1993* at 3 (Oct. 5, 1993).

[4] *See Second Report and Order*, 91 F.C.C.2d 59, 71 (1982). No party requested review of this decision at the time. Petitioners correctly note that AT&T itself defended permissive detariffing for some years thereafter. Pet. 6.

The *Competitive Carrier Rulemaking* was prompted by the FCC's concern that "some of the potential public benefits which we had hoped would flow from freer entry have been frustrated, in part, by continued adherence to rules and procedures governing tariff filings * * * designed primarily for carriers with dominant market positions and monopoly services." *Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C.2d 308, 330 (1979). *See also id.* at 309.[5] The FCC found that tariffing requirements imposed significant impediments to market entry, for the direct costs of preparing, filing, and maintaining a current tariff are substantial. In addition, the Commission recognized that access by both AT&T and other would-be competitors to one's competitive business proposals also results in substantial indirect costs on new entrants.

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[5] As the petitioners observe, this concern led the Commission to propose and later to adopt policies to reduce the regulatory burden on carriers with small market shares. Pet. 5. But the Commission's action was not simply a bald deregulatory policy favoring new entrants over the former monopolist AT&T. Rather, the policies adopted by the Commission were grounded in its reasoned and expert understanding of what regulations were necessary—and which were unnecessary or even detrimental—to compliance with the Communications Act.

In its 1979 Notice of Proposed Rulemaking, the Commission announced its "tentative belief that competitive carrier rates are highly unlikely to contravene the Act." 77 F.C.C.2d at 310. The Commission reasoned that under then-current market conditions and widely accepted economic theory "the rates of non-dominant carriers are unlikely to be either predatory or supra-competitive and thus are unlikely to contravene" the proscription of 47 U.S.C. § 201(b) on unjust and unreasonable rates. *Id.* at 334. Likewise, "these same factors preclude these [non-dominant] carriers from unjustly discriminating in favor of some customers at the expense of their other customers," *id.* at 337, in violation of the Act's prohibition on "unjust or unreasonable discrimination in rates," 47 U.S.C. § 202(a). The Commission endorsed these tentative conclusions in its *First Report and Order*, 85 F.C.C.2d 1, 5, 20 (1980), and has repeatedly confirmed them in its various rulemaking activities under the *Competitive Carrier Rulemaking* docket. *See, e.g.*, 93-356 Pet. App. 27a-28a.

These costs take on heightened significance in the context of firms with little or no market power trying to break in against a longstanding industry giant. As the FCC explained, carriers attempting to compete with AT&T "must either offer services unavailable from the established carriers or, more likely, offer services with rates, conditions and practices more favorable than those offered by the established carriers." *Id.* at 324. Because AT&T could respond to competitors' service offerings "by offering comparable service alternatives of its own, * * * as a practical matter, the [competing carriers] must, more often than not, underprice the established carriers to compete successfully." *Id.* But publication of this pricing information—like publication of service offerings—could provide AT&T with an opportunity to squelch any competitive challenge by adjusting its prices and taking other actions accordingly.

More generally, the FCC has repeatedly found that mandatory tariff filings by carriers without market power would likely have *anticompetitive* effects. Thus, for example, the Commission noted that "[r]equiring adherence to tariffs where competitive pricing would flourish otherwise may make collusive pricing possible by both facilitating agreement and preventing the secret discounts that often lead to the breakdown of agreements that are attempted." 77 F.C.C.2d at 358. The Commission further concluded that continued regulation of nondominant firms would "discourage the introduction of new, competitive services," discourage entry into the market by new firms, and inhibit innovative pricing mechanisms. *Id.* These conclusions too have been repeatedly endorsed by the Commission in its decade of experience with and examination of deregulation of nondominant interexchange carriers.[6] For example, the FCC emphasized in the rule-

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[6] *See, e.g., Fourth Report and Order*, 95 F.C.C.2d 554, 555 n.1 (1983) (tariff filing requirements "impede entry, impair competitive pricing, and facilitate collusive conduct") (citing *United States*

making directly at issue here its finding that "mandatory tariff regulation of nondominant carriers was in fact at odds with the fundamental statutory purpose set forth in Section 1 of the Act [7] because it inhibits price competition, service innovation, entry into the market, and the ability of firms to respond quickly to market trends." 93-356 Pet. App. 27a.[8]

Given the costs and negative effects resulting from tariff filings by nondominant carriers, the FCC's policy initiative freeing those carriers from the requirement of publicly filing pricing information removed a significant impediment to the growth of competition in the market. Indeed, the Competitive Telecommunications Association

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v. *United States Gypsum Co.*, 438 U.S. 422, 457 (1978) ("the exchange of price information among competitors carries with it the added potential for the development of concerted price-fixing arrangements")); *Second Report and Order*, 91 F.C.C.2d at 71 (tariff "requirements stifle price competition and service and marketing innovation"); *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445, 454 (1981) ("Tariff posting * * * provides an excellent mechanism for inducing noncompetitive pricing").

[7] Section 1 of the Communications Act, 47 U.S.C. § 151, imposes on the FCC the mandate "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."

[8] The FCC has endorsed the fundamental conclusions supporting its regulatory decisions even after the D.C. Circuit issued the decision at issue in this case. In its memorandum opinion and order in *Tariff Filing Requirements for Nondominant Carriers*, FCC 93-401 (Aug. 18, 1993) (*"Rate Range Order"*), the Commission "reaffirm[ed]" its "policy findings, adopted nearly a decade ago in *Competitive Carrier*, and conclude[d] that * * * traditional tariff regulation of nondominant carriers is not only unnecessary to insure just and reasonable rates, but is actually counterproductive since it can inhibit price competition, service innovation, entry into the market, and the ability of carriers to respond quickly to market trends." Nevertheless, the FCC was constrained to impose some type of tariff regulation on nondominant carriers becasue the court below had held that filed tariffs are required by the Act.

told the FCC that many of the companies operating in the market "would not be in existence today were it not for the Commission's policy of encouraging competition in the telecommunications marketplace through the lifting of unnecessary and burdensome regulations." Reply Comments of the Competitive Telecommunications Association at 11.[9]

The significance of the decision below, and the need for this Court's review, is made plain by the overwhelming interest exhibited in the issue. In response to the Notice of Proposed Rulemaking, the FCC "received and reviewed comments from more than 40 parties representing virtually every segment of the interstate telecommunications industry, including long distance carriers, local exchange carriers, and telecommunications users." 93-356 Pet. App. 4a-5a, and also considered the comments of the National Telecommunications and Information Administration of the U.S. Department of Commerce.[10] "[O]nly six parties, led by AT&T, claim[ed] that the Commission was without authority to adopt its permissive detariffing rules." *Id.* at 9a. Even some dominant local telephone companies agreed that the Commission was

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[9] Citations to comments are to those comments received by the FCC in response to *Tariff Filing Requirements for Interstate Common Carriers*, Notice of Proposed Rulemaking, 7 FCC Rcd 804 (1992), the proceeding that led to the decision at issue here.

See also Comments of OCOM Corporation at 8 ("Many of the smaller carriers today would not be here now or be able to continue offering competitive services under a more burdensome regulatory structure." Permissive detariffing is "critical to the survival of a substantial number of nondominant interexchange carriers").

[10] NTIA noted that "the Commission's decision in *Competitive Carrier* to relieve nondominant carriers of the burden of filing tariffs has significantly enhanced their ability to respond rapidly to changing market conditions and enabled them to be vigorous competitors in the interexchange service marketplace." Reply Comments of the National Telecommunications and Information Administration at 5.

authorized to adopt its permissive detariffing policy. *See, e.g.*, Comments of Pacific Telesis Group at 3; Comments of GTE Service Corporation at 2 (Commission's policy "conforms fully with the Communications Act").[11]

Perhaps most compelling is the unanimity of the *users* of long distance telecommunications services in support of the policy. For example, the Ad Hoc Telecommunications Users Committee (the ongoing representative of major corporate telecommunications departments on regulatory issues), called the Commission's policy "a major regulatory success story" as a result of which "[c]ompetition has burgeoned in the long-distance marketplace." Of particular interest to the users of telecommunications services, "the policy has enabled nondominant carriers to respond flexibly to requests for proposals * * *, to cost out their responses on a project-specific basis, and to formulate customer-responsive terms and conditions." This flexibility, in turn, "has intensified price and service competition among the nondominant carriers and AT&T." Comments at 3. Likewise, the International Communications Association, which describes itself as "the largest association of telecommunications users in the world," observed that the permissive detariffing policy permits nondominant common carriers "to make rapid, efficient responses to changes in demand and cost; bargain with customers over rates and adjust rates quickly to market conditions; avoid petitions to reject or suspend tariffs that could be filed by competitors; and price competitively," all without any detriment to users. Comments at 5.

In short, the FCC's detariffing policy has served its intended functions as contemplated in the *Competitive Carrier Rulemaking* over a decade ago. Adopted at a

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[11] GTE added that permissive detariffing has "facilitated these [nondominant] carriers' efforts to compete with each other," and "made it possible for consumers to negotiate directly with service providers and for carriers to tailor offerings to specific customers based upon each customer's needs and wants." *See* Comments of GTE Service Corporation at 6-7.

time of almost no competition in the market for long distance services, the policy has enabled hundreds of new firms to enter and begin to compete effectively by offering innovative service and rate plans. Consumers have benefited as a result of the ability to choose from a range of alternative service providers, and prices for long distance service have decreased dramatically. There is no evidence of widespread violations of the substantive rate regulation required by the Act; as the FCC anticipated, vigorous competition in the marketplace has provided a more-than-adequate substitute for filed tariffs.

Although the Commission's permissive detariffing policy has been an unqualified success, the substantial marketplace benefits derived from the policy could easily be lost, and further development of competition stunted, if the decision below stands. A mandatory tariff requirement on nondominant carriers necessarily curbs those carriers' ability to offer innovative price and service plans to meet customer needs as they arise.[12] This is true even though the FCC has attempted to minimize the tariff burden on nondominant carriers as it responds to the court of appeals' decision here. The Commission has permitted nondominant carriers to file so-called rate range tariffs setting forth minimum and maximum rates and offering prices within the bands. *See Rate Range Order, supra.* Even these tariffs impose unnecessary burdens on carriers,[13] and in any event AT&T and certain local telephone companies have

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[12] *See Further Notice of Proposed Rulemaking*, 84 F.C.C.2d at 454 ("the requirement that firms post their prices makes it difficult for those same firms to bargain with their customers over rates or to adjust them quickly to market conditions. This in turn means that the kind of price discounting that often occurs in a workably competitive market cannot take place").

[13] For example, carriers still must file additional tariffs when they want to offer prices to customers outside the ranges. The full direct and indirect costs of tariff filings under the new rules will not become clear until more guidance is given on the permissible scope of the ranges.

challenged the Commission's *Rate Range Order* based on the same court of appeals decision at issue here.[14] The posting of tariff information permits dominant firms as well as other nondominant competitors quickly to match any innovation, thereby blunting competitive forces. In a long distance market where one firm still controls more than 60 percent of the business, any reduction in the pressure of competition is likely to be damaging to that market's further development.

II. THE ERRONEOUS DECISION OF THE COURT BELOW WILL INHIBIT THE FCC'S ABILITY TO FOSTER COMPETITION IN OTHER TELECOMMUNICATIONS SERVICES

The importance of the court's decision below is magnified by its potential consequences for telecommunications services other than long distance. This matter is much more than an intramural dispute between AT&T and its smaller rivals. Although reversal of the permissive detariffing policy will stunt further competitive long distance growth, it is unlikely to lead all the way back to full monopoly power for AT&T. But other telecommunications markets—where competition is far less advanced—present an entirely different story.

The market for local exchange services is perhaps the prime example of an area experiencing emerging competition that could be thwarted by reimposition of tariffing requirements. This multi-billion dollar market is now the domain of the Bell Operating Companies and other local exchange telephone companies ("LECs"). But like the long distance market in the early 1980s, the local telephone market is the focus of increasing competition.[15]

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[14] *See Telecommunications Reports*, Sept. 13, 1993, at 22.

[15] As the Commission has explained: "For many years, local exchange carriers (LECs) faced little or no competition in provid-

The Association for Local Telecommunications Services ("ALTS") explained in comments before the FCC that its member nondominant competitive access providers ("CAPs") "attempt to compete directly with dominant local exchange carriers" by "deploy[ing] innovative technologies—including fiber optic and microwave networks"—in metropolitan areas across the country. ALTS Comments at 1-2. This industry, ALTS reported, "is just beginning to bring competitive alternatives to local telecommunications service markets historically monopolized by the LECs." *Id.* at 2. Thus, for example, Metropolitan Fiber Systems "operates state-of-the-art digital fiber optic telecommunications networks in the business districts" of major metropolitan areas throughout the United States. Comments of Metropolitan Fiber Systems at 2. *See also* Comments of Local Area Telecommunications, Inc. at 2 (company provides "a broad range of * * * competitive access services, primarily via microwave facilities, to interexchange carriers and corporations in various metropolitan areas nationwide"). Nevertheless, the CAP share of the total market for local telephone exchange services remains less than one percent. ALTS Comments at 5-6.

The Commission has recently adopted new local exchange policies to begin what it calls "the process of opening the remaining preserves of monopoly telecommunications service to competition," and to give CAPs far greater market opportunities than they have had in the past. *See, e.g., Expanded Interconnection,* Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7372 (1992). In that context, the Commission noted the suc-

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ing the local access facilities and services used in the provision of interstate communications. Recent changes, however, have facilitated the development of competition in the provision of these facilities and services." *Expanded Interconnection with Local Telephone Company Facilities ("Expanded Interconnection")*, Notice of Proposed Rulemaking and Notice of Inquiry, 6 FCC Rcd 3259, 3259 (1991).

cess of its deregulatory approach toward long distance services: "Competition in the interexchange * * * market[] has brought consumers increased service options, reduced rates, and faster implementation of new technologies." *Id.* at 7378. Likewise, the FCC believes that greater competition in the local telephone market should increase "incentives for efficiency and encourage deployment of advanced technologies facilitating new and innovative services." *Expanded Interconnection*, Second Report and Order, FCC 93-379, at 10 (Sept. 2, 1993). The Commission has taken several actions to foster competition in the local telephone market, and further proposals are pending.[16]

The FCC's steps to promote new local service competition have taken place against a background of permissive detariffing for nondominant CAPs,[17] supported by the same FCC policy conclusions arrived at in the *Competitive Carrier Rulemaking* described earlier.[18] Under the decision below, however, the Commission has been required to reimpose tariff regulation on the CAPs along with all other nondominant carriers.[19] Such regulation substantially and unnecessarily interferes with the still-

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[16] *See, e.g., Expanded Interconnection*, Second Notice of Proposed Rulemaking, 7 FCC Rcd 7740, 7747-49 (1992).

[17] *See, e.g., Tariff Filing Requirements for Nondominant Common Carriers*, Notice of Proposed Rulemaking, 8 F.C.C. Rcd 1395, 1397 (1993) ("Since their inception, CAPs have not been burdened by interstate tariff filing requirements"); Comments of Metropolitan Fiber Systems, Inc. at 3 ("As a non-dominant carrier * * * MFS is subject to the Commission's forebearance policy and therefore, under those regulatory requirements, is not required to file interstate tariffs").

[18] *See, e.g.*, Comments of ALTS at 6 ("The competitive pressures faced by the members of ALTS as new entrants into largely monopoly markets are extraordinary, and exclude the possibility that CAPs may engage in ratemaking practices that contravene the Communications Act").

[19] *See Rate Range Order*, FCC 93-401, at 8 (Aug. 18, 1993).

emerging competition in the local market, no less than it would have interfered with new long distance competition a decade ago. CAPs face substantial hurdles to market entry, including the need for massive capital investment and vigorous price competition from the reigning monopolists. As ALTS explained below, "[i]mposition of a mandatory tariffing obligation would impose a substantial economic burden on such carriers. The costs associated with the preparation and maintenance of federal tariffs—legal and consulting fees, the diversion of personnel, the filing fees—constitute an expense that CAPs can ill afford." ALTS Comments at 6-7. More important, mandatory tariffing can provide an opportunity for the dominant LECs to bring price and service rigidity to the marketplace, thereby discouraging innovations CAPs might offer in service or price and stifling the newborn competitors.

Local telephone competition holds the promise to revolutionize the nation's telecommunications infrastructure. The FCC envisions a future in which multiple carriers—local and long distance, mobile and wireline—interconnect with one another and compete to offer business and residential users advanced quality services at lower prices. But to reach that goal, the FCC will need all the tools provided by the Communications Act to manage developing competition and to meet the regulatory challenges presented by the dynamic changes currently occurring in the telecommunications market. Permissive detariffing—and the legal authority on which it rests—are of paramount importance to this process.

III. THE COURT SHOULD CLARIFY THIS ISSUE TO PROVIDE CERTAINTY TO THE FCC AND ALL AFFECTED PARTIES

At a minimum, the Court should grant the Petition so that it can clarify the meaning of Section 203 and provide certainty to all affected parties. The decision below clearly has not provided that certainty, for the FCC and

parties in the telecommunications market continue to debate the meaning and implications of the D.C. Circuit's decision, while the D.C. Circuit—through summary action here—has signaled that it has given its last word on the subject. So long as the obligation of a carrier to file tariffs remains in doubt, competition in the telecommunications market in general is chilled.

Indeed, the FCC's response to the D.C. Circuit's decision is itself under attack, creating further uncertainty. As discussed above, the FCC recently ruled that nondominant carriers could satisfy the requirements of Section 203 by filing tariffs containing rate ranges; carriers would then offer customers prices within the minimum and maximum rates spelled out in the tariff. *See Rate Range Order, supra.* However, AT&T and certain local telephone companies have asked the D.C. Circuit to stay this decision on the ground that the FCC's "second best" rate range tariff policy also exceeds the Commission's authority under Section 203 as interpreted by the court of appeals below.

The *amici* have already stated their strong support for the petitioners' legal analysis of the Section 203 issue. The same analysis would support "rate range" tariffs. However, leaving aside the practical deficiencies of range tariffs as opposed to permissive detariffing itself, the fact remains that until and unless this Court speaks to Section 203, all parties will be in doubt as to the permissible scope of FCC regulation in this area.

This is not an academic question. One would expect that so long as a carrier followed FCC rules, it would face no legal jeopardy. AT&T and certain local telephone companies, however, are taking a different position that is very hostile to competition. AT&T, for example, has sued MCI Telecommunications Corporation, Sprint Communications Company and WilTel, Inc. for "many millions of dollars" in damages it claims to have suffered as a result

of those carriers' tariff filing practices—practices they undertook prior to the court of appeals' decision and in full reliance on the FCC's permissive detariffing policy.[20] AT&T also has threatened to file damage actions against other long distance rivals. Equally important, AT&T has made clear that it views a carrier's compliance with the *Rate Range Order* as no more of a safe harbor from damages than was a carrier's previous compliance with permissive detariffing.[21]

Certain local telephone companies have taken similar aggressive action against CAPs. For example, within days of the original court of appeals' decision striking down permissive detariffing, Bell Atlantic filed complaints at the FCC against MFS and seven other smaller CAPs for damages it allegedly suffered as a result of those CAPs' past compliance with that policy.[22]

Although these damage actions have no merit, they demonstrate how uncertainty regarding Section 203 can be used by dominant carriers to harass their smaller rivals, impose unnecessary financial burdens in the form of legal costs, and deter entry by new competitors. The burdens and complications of tariff filing themselves are

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[20] *See Telecommunications Reports*, Feb. 15, 1993, at 2 (quoting AT&T's President of Business Communications Services claiming that AT&T had lost "over $1 billion in business" and "many millions of dollars" in profits).

[21] *See Telecommunications Reports*, Sept. 13, 1993, at 22. In asking the FCC to stay the *Rate Range Order*, AT&T stated that "some of AT&T's injuries [from competitors' range tariffs] are easily ascertainable and can be recovered [from competitors] in a damages action," but argued that a stay was necessary because other damages "are much more difficult to quantify." *Id.* (quoting AT&T Application for Stay).

[22] *See Telecommunications Reports*, Nov. 23, 1992, at 1-2. Bell Atlantic alleged that it was entitled to damages "in an amount to be determined" for "lost customers, lost market position and lost profits" it claims to have suffered due to the CAPs' failure to file tariffs. *Id.* (quoting Bell Atlantic complaints).

large, especially for a smaller firm. The threat of damages liability from a dominant firm can be an extreme impediment to development of further competition.

Telecommunications users also require clarification of Section 203. Under permissive detariffing, users knew that they had substantial flexibility to contract with nondominant firms. Now they face practical concerns regarding incorporation of their existing contracts into tariffs, and limitations on their ability to negotiate new contracts. Furthermore, in letters to hundreds of long distance users, AT&T has asserted that existing contracts with other long distance companies "are unlawful and, therefore, unenforceable," and that it may be unlawful to deal with smaller competitors lacking tariffs meeting AT&T's interpretation of section 203.[23] Although obviously wrong, such strategies nevertheless can be effective coming from a dominant firm.

In short, the D.C. Circuit's decision is causing confusion throughout the telecommunications market that is benefiting only AT&T and the dominant local telephone companies. This Court earlier declined to consider the issue in the face of the Solicitor General's view that review would be premature until the FCC completed its own reexamination of permissive detariffing and the D.C. Circuit had the opportunity to consider the results of that process. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 113 S. Ct. 3020 (1993). The FCC's examination is now complete, and the D.C. Circuit summarily rejected the FCC's judgment. Given the obvious divergence of views between the FCC and

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[23] *See Telecommunications Reports*, Mar. 15, 1993, at 35-36 (quoting letter from President of AT&T Business Communications Services to AT&T customers and potential customers stating that "AT&T and customers have been harmed" by nondominant carrier provision of service "under secret contracts" rather than tariffs and warning that such "secret deals with long distance companies are unlawful and, therefore, unenforceable").

the D.C. Circuit, the issue will not disappear until this Court speaks. The Court should grant the Petition and clarify the FCC's authority over the transition to full telecommunications competition.

CONCLUSION

For the foregoing reasons, and those in the Petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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